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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 467

CHARLES E. BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DANIEL H. GREENBERG
Counsel for Petitioner
Office and Post Office Address
110 East 42nd Street
New York, New York 10017
OXford 7-3280

MARVIN MARGOLIS
Of Counsel

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Charles E. Brown prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on July 22, 1965.

Opinion Below

The opinion of the court of appeals in this case has not yet been reported. It is reprinted as Appendix "A" hereto, *infra.*

Jurisdiction

The judgment of the court of appeals was entered on July 22, 1965. The jurisdiction of this Court is invoked under Title 28, United States Code, §1254(1).

Questions Presented

The following questions are presented in this case:

1. Whether as a matter of law the evidence was sufficient to sustain petitioner's conviction for "unlawfully, wilfully and knowingly and with intent to defraud" passing and uttering one counterfeit ten dollar bill and with the criminal possession of one other counterfeit ten dollar bill.

2. Whether it was prejudicial error to receive in evidence the hearsay testimony of the interested police officer witness Rapaport, to the effect that petitioner had been identified through a secret window in the police station by the witness Keys, as the person who had attempted to pass a counterfeit ten dollar bill in his establishment the night before the crimes charged in the indictment, after Mr. Keys had been unable at the trial to identify petitioner as such person.

Statute Involved

Title 18, United States Code

§472. *Uttering counterfeit obligations or securities*

Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

STATEMENT OF THE CASE

The Indictment

This was a two count indictment. Count One alleged that on April 4, 1964, petitioner "unlawfully, wilfully and knowingly, with intent to defraud, did pass, utter and publish, and attempt to pass, utter and publish, falsely made, forged and counterfeited obligation and security of the United States, to wit: One (1) ten dollar ($10.00) Federal Reserve note, bearing serial number B 462072291." The Second Count alleged that on the same date, petitioner "with intent to defraud, wilfully, knowingly and unlawfully, did keep in his possession and concealed a certain falsely made, forged, counterfeited and altered obligation and security of the United States, to wit: Two (2) ten dollar ($10.00) Federal Reserve notes, bearing serial number B 462072291". Both counts charged violations of Title 18, United States Code, §472. It was conceded that one of the counterfeit bills alleged in the second count was the same as the one alleged in the first count.

The Record

The record in this case before the court of appeals consisted of the complete typewritten trial record of the district court. By leave of the court of appeals, four photocopies of the typewritten trial transcript were filed as an appendix in that court, together with a copy of the indictment, as an appendix. One of such copies, certified by the Clerk of the Court of Appeals, is filed with this Court, together with this petition.

The Facts

On April 4, 1965, petitioner entered Rapson's Bar & Grill in Port Chester, New York, went to the bar and ordered a drink, paying for it with a ten dollar bill. The bartender, Elliot Rapaport, one of the owners of the place, served petitioner and took the ten dollar bill to the cash register. He checked the bill number against a list at the register, found it on the list as being counterfeit, and then signalled to his brother, Jerome Rapaport, a local police officer then off-duty, who was in the bar. Jerome Rapaport called the police and observed petitioner who remained a while longer in the bar (18-23, 34-37).[1]

When petitioner started to leave he was stopped by a third brother, Lawrence Rapaport, and then arrested by Jerome Rapaport (23, 36-37). Petitioner was taken to the Port Chester police station, where he was directed to empty his pockets, then to disrobe (37-38). When he took off his shoes, a second ten dollar bill was found in his right shoe by one of the detectives (42). Approximately $55 in genuine currency was found in petitioner's pockets (39).

Petitioner was detained until two secret service agents came from New York City, and they took him into custody. Agent Melchiori, a Secret Service agent, testified as an expert that the two $10 bills in question were counterfeit (89-90). He testified that it took him approximately ten minutes of examination of each bill to ascertain that they were counterfeit (95).

There was no other evidence introduced against petitioner to show that he knew the bills in question were

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[1] All numbers in parentheses refer to pages in Appellant's Appendix, unless otherwise indicated.

counterfeit and that his attempting to utter or pass one of them and his possession of both of them was with criminal intent. The foregoing constituted all of the substantive evidence against appellant.

In an attempt to prove petitioner's knowledge that the two $10 bills were counterfeit, and also to establish criminal intent, the prosecution called as a witness a Mr. William Keys (99-109). Mr. Keys testified that he owned and operated the Empire Bar & Grill in Port Chester, New York; that on the night of April 3, 1964, Friday night, the night before the events leading to petitioner's arrest, a man came into his bar and tried to pay for a drink with a "counterfeit" ten-dollar bill (101). Mr. Keys refused to accept this bill and "threw it back" at the man (101). Upon being asked if that man was present in the Court room, he stated "I'm not sure" (103). He thereafter failed to or was unable to identify petitioner as that man (103).

Mr. Keys testified that on the following night (Saturday night), in the police station, he identified the man who attempted to pass this bill upon him (104). Again, however, he failed to identify petitioner as that man, stating again, "I'm not sure" (105).

Thereupon, over objection, Police Officer Jerome Rapaport testified that on April 4, 1964, through a one-way window in the police station, Mr. Keys identified petitioner, as the man who had attempted to pass the counterfeit ten dollar bill upon him the night before (112).[2] There

[2] When Officer Rapaport testified as to the Keys' identification of petitioner, he said, "he made a positive identification". On objection this characterization was stricken by the trial court (112); later, however, in its charge to the jury, the court referred to the fact that Rapaport testified Keys had made a "positive identification" of petitioner (212). This improper characterization by the trial court went unnoticed in the exceptions to the charge.

was never any face-to-face confrontation of Mr. Keys and petitioner in the Port Chester police station or any other place, until the actual trial when they were in the court room at the same time.

Petitioner testified as a witness in his own behalf. He denied knowledge of the counterfeit nature of the two bills in question. He explained that he had been playing poker and drinking, both on Friday and Saturday, and that in effect he was on a "lost weekend". Petitioner had no criminal record of any kind, and in support of his case offered proof of good character through character witnesses.

The case was submitted to the jury at about 1:00 p.m. on January 12, 1965 (231), with directions that they were not to commence their deliberations until after lunch (231). At about 2:15 p.m. the jury started their deliberations (236). At 6:20 p.m. the jury returned to the court room with a note, stating that they stood nine guilty, three not guilty, and that they could not come to a decision (238). The trial court gave them a modified form of the *Allen* charge (164 U. S. 492), and then sent them to dinner. After dinner, at their request, the jury had the testimony of both Mr. Keys and Police Officer Jerome Rapaport read to them (244). This related solely to the identification of petitioner as the man in Keys' bar the night before the arrest, and to Rapaport's testimony that Keys had identified petitioner through the one-way window in the police station.

Finally, at 10:15 p.m. the jury returned its verdict against petitioner (247). Thereafter, on February 25, 1965, petitioner was sentenced to 90 days imprisonment, and two years probation (256).

Reasons for Granting the Writ

Although this case covered a very short trial, with only a 90 day jail sentence imposed against petitioner, nevertheless the issues involved herein are important and relate to the proper administration of federal criminal justice.

1. As a matter of law, the evidence in this case was not sufficient to sustain petitioner's conviction for "unlawfully, wilfully and knowingly and with intent to defraud" passing and uttering one counterfeit ten dollar bill and with the criminal possession of one other counterfeit ten dollar bill.

The only substantive evidence introduced at the trial against petitioner that he violated the laws against possession and passing of counterfeit money was the fact that he attempted to pass one bill in Rapson's bar and that he possessed another bill in his right shoe. As to the latter bill, he testified that he put this bill in his shoe because he was playing cards and this was to be his last money, in case he lost all his money, so that he would have sufficient money to get home, as for cab fare (134). There was no other substantive evidence offered against him at the trial. Moreover, there was no proof of knowledge or intent offered against him.

In the case of *United States* v. *Forzano,* 190 F. 2d 687, 688 (2nd Cir., 1951), Circuit Judge A. N. Hand wrote as follows:

> "The mere passing of counterfeit money without more may be insufficient to show guilty knowledge, *United States* v. *Ruffino,* 2nd Cir. 67 F. 2d 440, *United States* v. *Litberg,* 7 Cir. 175 F. 2d 20, there was more in this case."

In the leading case of *United States* v. *Carll,* 105 U. S. 611, 613 (1882), this Court stated:

> "Knowledge that the instrument is forged and counterfeited is essential to make out the crime; and an uttering, with intent to defraud, if an instrument in fact counterfeit but supposed by the defendant to be genuine, though within the words of the statute, would not be within its meaning and object."

It is to be noted that although petitioner stipulated that the two $10 bills involved in this case were counterfeit, the prosecution insisted on having its expert witness, Secret Service Agent Melchiori, testify in detail as to his examination of the bills and as to the various points by which he ascertained that these bills were counterfeit (89-90). He testified that it took him ten minutes examination of each bill to reach the conclusion that each was counterfeit. Thus, their illicit nature was not obvious or readily apparent to the untrained eye. Guilty knowledge could not be determined from the mere possession of these bills.

In the case of *Marson* v. *United States,* 203 F. 2d 904, 906 (6th Cir., 1953), the Court wrote as follows:

> "It is true that the naked act of possessing and passing counterfeit money does not give rise to a legitimate inference of guilty knowledge. Prince v. United States, 4 Cir. 70 F. 2d 467. Knowledge or belief of the counterfeit character of the money is an essential element of the crime of passing counterfeit money; Zottarelli v. United States, 6 Cir. 20 F. 2d 795; United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135; and the evidence of such knowledge has to be proved beyond a reasonable doubt; Gallagher v. United States, 1 Cir. 144 F. 87."

Thus, apart from the attempt to show some evidence of intent through the Keys affair, there is absolutely nothing in the record of this case to support the jury's verdict. The prosecution's lack of proof, petitioner's own testimony, his prior clean record, and the evidence of his good character or reputation, all add to the conclusion that as a matter of law there was no proof beyond a reasonable doubt of his guilt. For this reason at least, petitioner's motion for a judgment of acquittal should have been granted by the trial court (113-114), or entered by the court of appeals. *Bryan* v. *United States,* 338 U. S. 552 (1950); Title 28, United States Code, §2106; Rule 29(a), Federal Rules of Criminal Procedure.

2. It was prejudicial error to receive in evidence the hearsay testimony of the interested police officer witness Rapaport, to the effect that petitioner had been identified through the secret window in the police station by the witness Keys, as the person who had attempted to pass a counterfeit ten dollar bill in his establishment the night before the crimes charged in the indictment, after Mr. Keys had been unable at the trial to identify petitioner as such person.

At the outset of this argument, it should be stated that the incident relating to Mr. Keys, weighed heavily in the jury's determination, and clearly it was not a matter of substantive evidence; rather this attempt to prove a prior attempted similar act was an effort by the prosecutor to show petitioner's criminal knowledge and intent. It was precisely this sort of proof which Mr. Justice Douglas, in *Bridges* v. *Wixon,* 326 U. S. 135, 153-154 (1945), stated was

> "certainly not admissible in any criminal case as substantive evidence. *Hickory* v. *United States,* 151 U. S.

303, 309, *United States* v. *Block*, 88 F. 2d 618, 620. So to hold would allow men to be convicted on unsworn testimony of witnesses in a practice which runs counter to the notion of fairness on which our legal system is founded."

In the light of the law which has developed on this subject, it is fair to state that the purported prior unsworn identification of appellant by the witness Keys, through a one-way glass window, in a police station, without any face-to-face confrontation, as testified to by a declared interested witness (see the trial judge's charge, at p. 226), should not have been presented to the jury.

In the early case of *Di Carlo* v. *United States*, 6 F. 2d 364, 366 (2nd Cir. 1925), Judge Learned Hand, wrote:

> "On the other hand, it is held in many jurisdictions, probably in the greater number of those which have decided the question, that earlier identifications off the stand are inadmissible, when the witness is not subject to challenge for bias."

In *United States* v. *Block*, 88 F. 2d 618, 620 (2nd Cir., 1937), Judge Hand pointed out that such identification evidence is not substantive evidence in the case. In *United States* v. *Graham*, 102 F. 2d 436 (2nd Cir., 1939), Judge Chase reaffirmed the general principle and the rules of exceptions. See Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harvard L. Rev. 177 (1948). Thus, where there is no reason of bias against the government for a witness to refuse to identify the defendant from the witness stand, after a prior purported off the stand identification, such testimony of the prior identification should not be received. *Bridges* v. *Wixon, supra.*

The same court of appeals recently had occasion to re-examine this question in the case of *United States* v. *De Sisto,* 329 F. 2d 929 (2nd Cir., 1964, opinion by Judge Friendly). In that case at a prior trial, an essential witness, one to the alleged hijacking of a truck, testified positively to the defendant De Sisto's identity. At the second trial, this identification became uncertain. However, in that case there was not any problem of a prior *unsworn* alleged identification, as in the present case. As a matter of fact, Judge Friendly limited the exceptions to the general rule (against admissibility of the prior identification) as follows:

> "And in the case of identification testimony, we think the exception to the orthodox rule which seems to be permitted by the Bridges opinion may properly embrace not only testimony so given but the even more probative consistent earlier identification for which the witness has later vouched under oath in the secrecy of the grand jury room or at a former trial. See Judges L. Hand and Hough in Di Carlo v. United States, 6 F. 2d 364, 366, 369 (2 Cir.), cert. denied, 268 U. S. 706, 45 S. Ct. 640, 69 L. Ed. 1168 (1925); Judge A. N. Hand in United States v. Forzano, 190 F. 2d 687 (2 Cir. 1961); 4 Wigmore, supra, §1130; McCormick, Evidence, supra, 108-09."

In the present case none of the quoted circumstances are present. The witness Keys was not a hostile witness; he refused under oath to say that petitioner had been the person in his establishment the prior evening or that he was the person he had identified through the one-way window in the police station. The testimony of the prior identification was the hearsay statement by Police Officer Jerome

Rapaport, a truly interested witness; and there were no other circumstances present warranting the receipt of Rapaport's testimony on this point.

That this testimony weighed heavily with the jury is apparent from their earlier declaration of a deadlock, and then from their desire to hear only this precise testimony read back to them. Accordingly, it is submitted that in this case, it was prejudicial error to receive the so-called identification testimony.

It should be noted that the court of appeals declined to pass on the merits of this issue, stating instead that it was not properly presented to them, for the reason "that no hearsay objection was taken to the Officer's testimony", citing *Diaz* v. *United States,* 223 U. S. 442, 450 (1912). It should be noted that specific objection was made to this testimony before the witness was re-called to recite it, and that both the trial judge and the prosecutor understood that petitioner objected to it, although they disagreed that the testimony was objectionable.[3] Here the court of appeals places a premium on a failure to repeat an objection, thus avoiding a decision on the merits of a controversy which undoubtedly would have been resolved in petitioner's favor. Judicial abnegation is not the same as abstention.

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[3] In its opinion, the court of appeals pointed out that there was "acquiescence" by government counsel in petitioner's contention that proper objection was taken by him to this hearsay identification testimony of Rapaport.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

DANIEL H. GREENBERG
Counsel for Petitioner

MARVIN MARGOLIS
Of Counsel

August 17, 1965.

APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 552—September Term, 1964.

(Argued June 14, 1965 Decided July 22, 1965.)

Docket No. 29658

UNITED STATES OF AMERICA,

Appellee,

—v.—

CHARLES E. BROWN,

Appellant.

Before:

KAUFMAN, HAYS and MARSHALL,

Circuit Judges.

Appeal from a judgment of conviction of the District Court for the Southern District of New York, for violating 18 U. S. C. §472, entered after a trial before a Jury and Judge Edmund L. Palmieri. Affirmed.

NEAL J. HURWITZ, Asst. U. S. Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, on the brief) (John E. Sprizzo, Assistant U. S. Attorney, of counsel), *for Appellee.*

DANIEL H. GREENBERG, New York, N. Y., *for Appellant.*

MARSHALL, *Circuit Judge:*

This is an appeal from a judgment of conviction for violating 18 U. S. C. §472, entered upon a jury verdict. We affirm.

Appellant was charged with passing and possessing counterfeit $10 Federal Reserve Notes with intent to defraud. It is conceded that appellant passed and possessed the counterfeit bills. He defended on the theory that he did not know that the bills were counterfeit, a necessary element of the crime. *United States* v. *Carll,* 105 U. S. 611, 613 (1882). The jury resolved this issue against appellant, and we hold that even in light of the strictures of *Marson* v. *United States,* 203 F. 2d 904, 906 (6 Cir. 1953), and *United States* v. *Forzano,* 190 F. 2d 687, 688 (2 Cir. 1951) against inferring the guilty knowledge from mere possession of counterfeit money, there was sufficient evidence upon which a reasonably jury could conclude that the prosecution proved beyond a reasonable doubt that appellant knew the bills were counterfeit.

Appellant claims that certain of this evidence supporting the verdict is hearsay and that the judgment of conviction should be reversed because its admission was erroneous. A prosecution witness, a Mr. Keys, testified that he owned a bar in the same town as where appellant had tried to pass the counterfeit bill, that on the day before the incident alleged in the indictment occurred a man came into his bar and tendered a $10 bill, that he recognized this bill as counterfeit and that he "threw it back" at the man. Government counsel then asked whether that man was present in the courtroom and the witness replied, much to counsel's

surprise, "I'm not sure." The witness then testified that on the next night he had been shown a man through a window in a door at the police station, whom he then identified as the man who attempted to pass him the counterfeit bill the night before. Counsel then asked Keys whether the man he identified was present in the courtroom, and the witness replied, "I'm not sure." Appellant's counsel did not cross-examine Keys.

After this witness was excused, the following occurred:

> Mr. Greenberg [defense counsel]: At this time I wish to strike this last witness's entire testimony.
>
> The Court: I deny the motion.
>
> Mr. Hurwitz [Government counsel]: May we have a side-bar conference at this time?
>
> The Court: Yes.
>
> (At the side-bar, without the hearing of the jury:)
>
> . . . . . .
>
> Mr. Hurwitz: . . . As may be apparent, this last witness positively identified Brown on the night of April 4th, and, indeed, had given us the description prior to that.
>
> The Court: Why don't you call in the detective?
>
> Mr. Hurwitz: I want to call the detective right now.
>
> The Court: You have established the chain of circumstances. It seems to me, if you don't do it he might have been right in moving to strike it.
>
> Mr. Hurwitz: I propose to call one of the two detectives.
>
> Mr. Greenberg: I object to it.
>
> Mr. Hurwitz: I don't see anything objectionable about it.
>
> The Court: I don't either.

(In open court.)

Mr. Hurwitz: Your Honor, may I recall Mr. Jerome Rapaport.

The Court: Yes.

Direct Examination by Mr. Hurwitz:

Q. Mr. Rapaport, you are still under oath. A. Yes.

Q. You testified on previous examination that you were at police headquarters in Port Chester, New York, on the evening of April 4, 1964. A. Yes.

Q. Did a Mr. William Keys arrive at police headquarters at Port Chester, New York? A. Yes.

Q. Do you know who Mr. William Keys is? A. Yes.

Q. What happened after he arrived? A. Well, Mr. Brown—he made a positive identification.

Mr. Greenberg: I object to that. It is a conclusion of the witness.

The Court: Yes, sustained. Strike it out.

Just tell us exactly what you saw him do.

Q. Tell us exactly what he did on that evening. A. Brown was in a section of the detectives' room. Mr. Keys went in there and looked through a two-way mirror glass that we had, and I remember I banged on the door, and Brown looked up, and he made an identification of the person that was in his bar.

Q. Of the person that was in whose bar? A. Mr. Keys' bar.

Mr. Hurwitz: I have no further questions.

(Witness excused.)

Appellant complains that Officer Rapaport testified as to hearsay when he testified that the man identified by Keys was the appellant and that this testimony was inadmissible as substantive evidence under the rule of *Bridges* v. *Wixon*, 326 U. S. 135 (1945) barring prior unsworn statements of a declarant available at trial for cross-examination. Appellee contends that what Officer Rapaport had testified to was not a statement of Keys, but rather an act of his, identifying a man, who the Officer could now identify, but Keys couldn't. It is urged that the rule of *Bridges* v. *Wixon* applies to testimony of prior statements rather than to prior identifications such as this, and we are referred to 4 Wigmore, *Evidence*, §1130 (3rd ed. 1940) and *United States* v. *Forzano*, 190 F. 2d 687, 689 (2 Cir. 1951).

It is, however, unnecessary for us to pass on the merits of this controversy, for it appears from the portion of the transcript quoted above, quite contrary to the impression created by appellant's counsel, with the acquiescence of the Government's counsel, that no hearsay objection was taken to the Officer's testimony. As far back as 1912 the Supreme Court declared in *Diaz* v. *United States*, 223 U. S. 442, 450, that if hearsay evidence "is admitted without objection, it is to be considered and given its natural probative effect as if it were in law admissible." *Cf.* also *United States* v. *Torres*, 343 F. 2d 750, 752 (2 Cir. 1965) (failure to object to admission of statement allegedly obtained during period of unnecessary delay prior to arraignment).

When first informed of the prosecutor's intention to recall Officer Rapaport, appellant's counsel said, "I object to that." However, this general objection does not cure the defect noted, especially since both the trial judge and the prosecutor indicated that they did not understand the basis of the objection and the objection was not renewed at the time Rapaport testified as to Keys' identification of appel-

lant. Subject to an exception not here applicable, "the cardinal principle (no sooner repeated by Courts than ignored by counsel) is that a *general objection, if overruled,* cannot avail the objector on appeal," 1 Wigmore, *Evidence,* §18, at 332. (3rd ed. 1940).

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 467

CHARLES E. BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 15-20) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1965. The petition for a writ of certiorari was filed on August 19, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether evidence that a witness had identified petitioner at a police station shortly after petitioner's arrest was properly admitted where the witness stated in court that he was not sure that petitioner was the person who had attempted to pass a counterfeit bill to him.

2. Whether the evidence was sufficient to support the verdict.

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of New York of uttering a forged ten dollar bill and concealing two such bills, in violation of 18 U.S.C. 472. He was sentenced to imprisonment for ninety days, and placed on probation for two years (R. 256).

The evidence showed that petitioner passed a counterfeit ten dollar bill at a bar in Port Chester, New York on April 4, 1965. When the owner of the bar found the number on a list of counterfeits, he signaled his brother, an off-duty policeman, who was in the bar at the time, and petitioner was subsequently arrested (R. 18-21, 33-37). At the police station, another forged bill was found in petitioner's right shoe (R. 41-42, 76-79).

Another bar owner, Mr. Keys, testified that on April 3 (the day before the offense charged) a man tried to pay for a drink with a counterfeit ten dollar bill, which Mr. Keys "threw" back (R. 101). When asked if the man was present in court, Mr. Keys

answered, "I'm not sure" (R. 103). Mr. Keys testified that on April 4 at the police station he had identified the man who attempted to pass the bill to him; but when asked if the man was in the courtroom, again he said, "I'm not sure." (R. 103-105). Petitioner moved to strike the testimony of the witness, and the government stated that it proposed to call a policeman to show that the witness had identified petitioner (R. 110). When petitioner's counsel objected, government counsel said he saw nothing objectionable and the court said, "I don't either" (R. 111). The policeman who had arrested petitioner then testified that on April 4 Mr. Keys, looking through a two-way mirror glass, had identified petitioner as the man who tried to pass the counterfeit bill in his bar (R. 112). The jury during their deliberations called for the testimony of Keys and the policeman (R. 244).

In affirming the conviction, the court of appeals ruled that it did not have to reach the question of the admissibility of the officer's testimony relating to the identification of petitioner by Keys, since petitioner's counsel had made only a general objection to such testimony and had not specified the grounds therefor, although both government counsel and the court had indicated that they did not understand the basis of the objection (Pet. App. 15-20).

ARGUMENT

1. As the court below noted, petitioner did not specify the basis of his objection to the policeman's

testimony of prior identification, although both government counsel and the court indicated that they did not understand the basis thereof. Under the circumstances, his general objection was not sufficient to preserve the issue on appeal. See *On Lee* v. *United States*, 343 U.S. 747, 749-750, n. 3; *Stewart* v. *United States*, 131 F.2d 624 (C.A. 5). In any event, the evidence was properly admitted. The question at issue is not the general one petitioner argues—the admissibility of a witness' prior unsworn inconsistent statement. Prior identification of the kind involved here is not a statement but an act of recognition, and it therefore has been held not to come within the rationale of the hearsay rule. See *Johnson* v. *State*, 254 Wisc. 320, 326. The policeman was fully competent to testify to Mr. Keys' act in identifying petitioner—to what he did, in other words, rather than just to what he said.

Moreover, it is generally recognized that a prior identification has greater probative value than a prior unsworn statement. While there are conflicting decisions on this point,[1] the view favored by text writers and a number of decisions would permit such evidence on the theory that a prior identification, being closer in point of time to the events at issue, is more apt to import verity than identification in a courtroom at a later trial. See 4 Wigmore, *Evidence*, § 1130.

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[1] The cases are collected in a lengthy annotation in 71 A.L.R. 2d 449.

Furthermore, the prior-identification testimony here was neither in direct contradiction to, nor in rehabilitation of, the testimony of the witness at the trial; it was complementary to such testimony. Mr. Keys was not sure that petitioner was the man with whom he had dealt and had identified the day after; but neither did he deny that petitioner was the person. The policeman's testimony that Mr. Keys had identified petitioner as the person with whom he had dealt the day before was a factor that the jury was fully entitled to consider in connection with the testimony of the witness who was present and was subject to cross examination. Most of the decisions have deemed evidence of prior identification admissible in these circumstances. See *R.* v. *Burke*, 2 Cox Cr. 295; *State* v. *Wilson*, 38 Wash. 2d 593, certiorari denied, 342 U.S. 855; *People* v. *Gould*, 54 Cal. 2d 621, 626. Cf. *United States* v. *De Sisto*, 329 F.2d 929 (C.A. 2), certiorari denied, 377 U.S. 979.[2]

2. The challenge to the sufficiency of the evidence is without merit. The finding of the second counterfeit bill in petitioner's shoe while good currency was in his pocket was in itself sufficient to justify an inference that he knew the bill was counterfeit. The circumstances testified to by Mr. Keys and the policeman provided additional support for that inference.

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[2] Some decisions have held such evidence admissible only to neutralize the adverse effect of the failure to identify. *State* v. *Kysilka*, 84 N.J.L. 6.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

RALPH S. SPRITZER,
*Acting Solicitor General.**

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

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* In lieu of the Solicitor General who has disqualified himself for personal reasons.

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